TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 394

ROBERTA WELLS, AS ADMINISTRATRIX OF THE ESTATE OF CREEK WELLS, PETITIONER,

vs.

SIMONDS ABRASIVE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 21, 1952

CERTIORARI GRANTED OCTOBER 13, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 394

ROBERTA WELLS, AS ADMINISTRATRIX OF THE ESTATE OF CHEEK WELLS, PETITIONER,

vs.

SIMONDS ABRASIVE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 12, 1952.

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[fol. a] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 10,549

ROBERTA WELLS, as Administratrix of the Estate of CHEEK WELLS, Appellant,

vs.

SIMONDS ABRASIVE COMPANY

Appendix to Brief for Appellant

[fol. 1] DOCKET ENTRIES

1. April 19, 1950, Complaint filed. April 19, Summons exit. April 19, Plaintiff's demand for jury trial filed.

2. May 1, Appearance of Charles J. Biddle, Esq. as Co-counsel for plaintiff filed.

3. May 10, Appearance of Philip Price, Esq. for defendant filed.

4. May 10, Answer filed.

5. May 16, Summons returned "on April 21, 1950 served" & filed.

6. July 11, Order to place case on trial list filed.

7. Aug. 8, Plaintiff's Interrogatories filed.

8. Aug. 15, Defendant's objections to plaintiff's interrogatories & notice filed.

9. Nov. 1, Order of Court re: objections to interrogatories, filed 11/2/50 Noted & Notice Mailed.

10. March 1, 1951, Defendant's motion for security for costs & notice of motion filed.

11. March 21, Defendant's notice of taking depositions of plaintiff filed.

12. March 21, Defendant's answers to interrogatories filed.

13. April 10, Affidavit of Plaintiff for leave to sue in forma pauperis filed.

14. April 20. Order vacating defendant's notice to produce plaintiff for depositions upon oral examination in Philadelphia, and directing that if such deposition is taken, it shall be upon 15 days' written notice at Anniston, Alabama, etc. filed 4/23/51 Noted & Notice mailed.

15. April 25, Defendant's motion for Summary Judgement filed.

16. April 25, Order to place the above motion on Argument list, filed.

17. May 2, Order of Court permitting plaintiff to proceed in forma pauperis filed—Noted & notice mailed 5-3-51.

May 21, Hearing sur defendant's Motion for Summary Judgment C.A.V. (Transferred to Judge Kirkpatrick on briefs).

18. July 25, 1951, Opinion, Kirkpatrick, J. granting judgment for defendant filed.

19. July 25, Judgment in favor of defendant with costs, filed 7/26/51 Noted & notice mailed.

20. Aug. 17, Plaintiff's notice of Appeal, filed. Copy to P. Price, Esq.

21. Aug. 17, Copy of Clerk's notice to U. S. Court of Appeals filed.

Sept. 11, Original Record transmitted to U.S. Court of Appeals.

[fol. 2] IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed April 19, 1950

The plaintiff, Roberta Wells as administratrix of the Estate of Cheek Wells, complaining of the defendant, Simonds Abrasive Company, a corporation, alleges as follows:

Count One

1. Plaintiff is a resident of the State of Alabama, and has been duly appointed as administratrix of the estate of Cheek Wells, deceased, by the Probate Court of Calhoun County, Alabama. The defendant is a corporation having its principal place of business in Philadelphia, Pennsylvania. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

2. Plaintiff claims of the defendant the sum of Fifty Thousand Dollars ($50,000.00) as damages for that to-wit, the 19th day of April, 1948, the defendant was engaged in the business of manufacturing or assembling emory or

grinding wheels which said emory or grinding wheels were sold or distributed to various wholesalers and dealers to be sold by them to the general public; that prior to to-wit, April 18, 1948, the defendant sold to Wimberly and Thomas of Birmingham, Alabama, in the due course of trade, an emory or grinding wheel which the said Wimberly and Thomas subsequently sold, in the due course of trade, to Peerless Pipe and Foundry Company of Anniston, Alabama, for use as a grinding wheel. Plaintiff avers that said emory or grinding wheel was not reasonably safe for use [fol. 3] as a grinding wheel but on the contrary was imminently dangerous when used for said purpose. Plaintiff avers that such danger was known to the defendant or by the exercise of reasonable diligence should have been so known. And plaintiff avers that said emory or grinding wheel was so defectively constructed that while the plaintiff's intestate who was an employee of the Peerless Pipe and Foundry Company of Anniston, Alabama, was using said grinding wheel for the purpose of grinding fittings one of the purposes for which the said wheel was manufactured the said emory or grinding wheel disintegrated or came to pieces while being turned on a lathe and a segment thereof struck plaintiff's intestate on his head proximately causing his death.

And plaintiff avers that the said damages aforesaid were a proximate result of the negligence of the defendant as aforesaid.

Whereas, plaintiff demands (1) damages in the sum of $50,000.00 (2) that plaintiff have judgment against the defendant for costs.

Merrill, Merrill and Vardaman. By (S.) John W. Vardaman, P.O. Box 286, Anniston, Alabama, Attorneys for the plaintiff; (S.) Charles Douglas, Radio Building, Anniston, Alabama, Attorney for Plaintiff.

Plaintiff demands a trial by jury.

(S.) John W. Vardaman, Of Counsel for Plaintiff.

[fol. 4] IN UNITED STATES DISTRICT COURT

DEFENDANT'S ANSWER TO COMPLAINT—Filed May 10, 1950

Defendant, Simonds Abrasive Company, in answer to the Complaint filed in the above case, avers:

First Defense

1. Defendant admits that it is a corporation having its principal place of business in Philadelphia, Pennsylvania. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 1 of the Complaint.

2. Defendant admits that prior to April 18, 1948, it was engaged in the business of manufacturing and selling grinding wheels and that prior to said date it occasionally sold its products to Wimberly and Thomas of Birmingham, Alabama. Defendant denies that any grinding wheel sold by it, either to Wimberly and Thomas or to any other purchaser, was not reasonably safe for use as a grinding wheel or was dangerous when so used or was defective in any respect whatever. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 2 of the Complaint.

Second Defense

3. Plaintiff's Complaint does not state a claim upon which relief can be granted against defendant.

Third Defense

4. Any right of action that plaintiff or anyone acting on behalf of Cheek Wells, deceased, might have had to recover damages for personal injuries to or the death of [fol. 5] Cheek Wells, deceased, is barred by the applicable statute of limitations.

Fourth Defense

5. The sole and proximate cause of any injuries that might have resulted in the death of Cheek Wells, deceased, at the time and place alleged in the Complaint was the negligence of Cheek Wells in the manner of performing the work in which he was then engaged.

Fifth Defense

6. Cheek Wells assumed the risk of any injuries sustained by him at the time and place averred in the Complaint.

Sixth Defense

7. Plaintiff is not entitled to maintain this action against defendant in this Court.

Seventh Defense

8. Under the law of the State of Alabama, plaintiff, or anyone acting on behalf of Cheek Wells, deceased, is not entitled to recover damages from defendant for any injuries that might have been suffered by or resulted in the death of Cheek Wells at the time and place and in the manner averred in the Complaint.

(S.) Philip Price, Attorney for Defendant.

[fol. 6] In United States District Court

Defendant's Motion for Summary Judgment—Filed April 25, 1951

Defendant, by its attorney, Philip Price, Esquire, moves the Court to enter a summary judgment in the defendant's favor dismissing the action on the ground that the right of action asserted by the plaintiff is barred by the Pennsylvania Act of April 26, 1855, P. L. 309, Sec. 2, 12 P. S. 1603, because it appears of record that the action was brought more than one year after the death of plaintiff's decedent on April 19, 1948.

(S.) Philip Price, Attorney for Defendant.

[fol. 7] IN UNITED STATES DISTRICT COURT

OPINION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before Kirkpatrick, Ch. J.

The plaintiff is the widow and administratrix of one, Cheek Wells, who was killed on April 19, 1948, when an emory wheel manufactured by the defendant, with which he was working, burst. The accident and death occurred in Alabama.

This action for damages was commenced in this court by the plaintiff, in her capacity as administratrix, on April 19, 1950, more than one year, but within two years, after the death. The plaintiff's right to sue arises under Title 7, Sec. 123 of the 1940 Code of Alabama which provides that the personal representative may bring an action for injuries causing the death of his decedent within two years after the death. However, the action being a diversity suit, this Court is bound to apply the conflict of laws rule of the State of Pennsylvania and by that rule the limitation of the Alabama statute has no controlling effect (unless, as will be seen, the position of the plaintiff should be sustained). In Rosenzweig v. Heller, 302 Pa. 279, 285, the Supreme Court of Pennsylvania held, broadly, that "a statute of limitation of the state of the forum controls the action." The Court said "Statutes of limitation should operate equally upon litigants seeking relief in our courts, upon those invoking remedies here for causes of action originating elsewhere, [fol. 8] the same as upon those whose rights arise directly in our Commonwealth."

Pennsylvania has two statutes providing for recovery of damages where death results from a wrongful injury—a death statute (the Act of 1855) with a one year limitation and a survival statute (the Act of 1937) with a two year limitation—but the only question here is whether the limitation of the Act of 1855 applies, or that of the Alabama statute. The answer depends upon the nature of the cause of action created by the Alabama statute, upon which the plaintiff's suit is grounded. The plaintiff contends that her cause of action is not the same as that created by the Pennsylvania Act of 1855, that, therefore, the rule of Rosenzweig vs. Heller, supra, does not apply and, there being no

comparable Pennsylvania statute, the limitation of the Alabama Act must govern.

I can agree with the plaintiff that the Alabama Homicide Act differs widely from the Pennsylvania Act of 1855. The measure of damages is entirely different and the parties who will benefit will be, in many cases, quite different, but the problem cannot be solved by laying the two statutes side by side and checking the various points of similarity or dissimilarity.

In Rosenzweig vs. Heller, supra, the Court was dealing with the New Jersey statute, which was a true death statute, and in laying down the rule, the Court was referring to [fol. 9] death statutes generally. The Restatement, Conflict of Laws, Sec. 433, which the Court quoted in support of its decision spoke broadly of a "death statute", and it is plain that the Court did not intend that the general policy announced by it should apply only to actions under foreign statutes having all the characteristics of the Pennsylvania Act of 1855.

The only question is whether the Alabama Act is a death statute, and I have no doubt that it is. It is, of course, obviously a punitive statute, at least so far as the defendant is concerned, but in all true death statutes, beginning with Lord Campbell's Act, the imposition upon a wrongdoer of civil liability for causing the death of another was basically a punitive concept. The injury which caused the death of this decedent may have created a right of action in him, but that right the Alabama statute does not pretend to keep alive. It is some wrongful act resulting in death which generates the cause of action. In Parker v. Fies & Sons, 243 Ala. 348, 10 So. 2d 13, the Court said "Our Homicide Act is a death statute, a punitive statute to prevent homicide. It creates a distinct cause of action, unknown at common law. The cause of action comes into being only upon death from wrongful act . . . Death resulting from the wrongful act is of the essence of the cause of action; the event giving rise thereto." The Alabama statute re- [fol. 10] sembles the Pennsylvania survival statute only in the party empowered to bring the suit and in the beneficiaries who share in the recovery, but that is superficial. The essential nature of the right of action created by the Alabama statute would have been exactly the same as it is now

had some public official been designated as the party to bring the suit and the amount assessed by the jury gone to the State.

Judgment may be entered for the defendant.

[fol. 11] Order granting leave to proceed in forma pauperis (omitted in printing).

[fols. 12-14] In United States District Court

No. 10,549

Roberta Wells, as Administratrix of the Estate of Cheek Wells, Appellant,

vs.

Simonds Abrasive Company

Appendix to Brief for Appellee

[fol. 15] In United States District Court

Defendant's Answers to Interrogatories

Defendant, Simonds Abrasive Company, makes the following answers to plaintiff's interrogatories in accordance with the order of the Court entered on November 1, 1950:

1. (a) Defendant has been so informed but does not know of its own knowledge whether any grinding wheel involved in the fatal accident to Cheek Wells was manufactured or constructed by it. Defendant is advised that such information would be available from employees of Peerless Pipe & Foundry Co., Anniston, Alabama. Defendant is advised further that the investigation file pertaining to said accident was originally made available to and was used by John W. Vardaman, of counsel for plaintiff, who then represented the insurance carrier for Peerless Pipe & Foundry Co. in the defense of a compensation claim by the present plaintiff arising out of the same accident, and that said John W. Vardaman thereafter changed sides and became counsel for the plaintiff and not only retained posses-

sion of said file but subsequently utilized it in the preparation of plaintiff's case against defendant.

* * * * * * *

IN UNITED STATES DISTRICT COURT

STATUTES REFERRED TO IN APPELLEE'S BRIEF

PENNSYLVANIA STATUTES

WRONGFUL DEATH ACT

Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus occasioned. (Act of April 15, 1851, P. L. 669, § 19, 12 P. S. § 1601.)

[fol. 16] The persons entitled to recover damages for any injuries causing death shall be the husband, widow, children, or parents of the deceased, and no other relatives; and that such husband, widow, children or parents of the deceased shall be entitled to recover, whether he, she or they be citizens or residents of the Commonwealth of Pennsylvania, or citizens or residents of any other State or place subject to the jurisdiction of the United States, or of any foreign country, or subjects of any foreign potentate; and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors under the laws of this Commonwealth. If none of the above relatives are left to survive the decedent, then the personal representative shall be entitled to recover damages for reasonable hospital, nursing, medical, funeral expenses, and expenses of administration necessitated by reason of injuries causing death. (Act of April 26, 1855, P. L. 309, § 1; Act of June 7, 1911, P. L. 678, § 1; as amended Act of April 1, 1937, P. L. 196, § 1, 12 P. S. (Supp.) § 1602.)

The declaration shall state who are the parties entitled in such action; the action shall be brought within one year

after the death, and not thereafter. (Act of April 26, 1855, P. L. 309, § 2, 12 P. S. § 1603.)

SECTION 35(a) OF THE FIDUCIARIES ACT OF 1917

No personal action hereafter brought, except actions for slander and for libels, and no action for mesne profits or for trespass to real property, shall abate by reason of the death of the plaintiff or the defendant, or by reason of the death of one or more joint plaintiffs or defendants; but the executor or administrator of the deceased party may be substituted as plaintiff or as defendant, as the case may be, and the suit prosecuted to final judgment and satisfaction. (Act of June 7, 1917, P. L. 447, § 35(a); Act of March 30, 1921, P. L. 55, § 1, 20 P. S. Ch. 3, App. § 771.)

[fol. 17] ACT OF JULY 2, 1937

Executors or administrators shall have power, either alone or jointly with other plaintiffs, to commence and prosecute all actions for mesne profits or for trespass to real property, and all personal actions which the decedent whom they represent might have commenced and prosecuted, except actions for slander and for libels; and they shall be liable to be sued, either alone or jointly with other defendants, in any such action, except as aforesaid, which might have been maintained against such decedent if he had lived.

All such rights of action which were not barred by the statutes of limitation at the time of the death of decedent may be brought against his executors or administrators at any time within one year after the death of the decedent, notwithstanding the provisions of any statutes of limitations whereby they would have been sooner barred. (Act of June 7, 1917, P. L. 447, § 35(b); Act of March 30, 1921, P. L. 55, § 1; Act of May 2, 1925, P. L. 442, § 1; Act of July 2, 1937, P. L. 2755, § 2, 20 P. S. Ch. 3, App. § 772.)

ALABAMA STATUTES

HOMICIDE ACT

Action for wrongful act, omission, or negligence causing death. A personal representative may maintain an action,

and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence, if it had not caused death. Such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be maintained, [fol. 18] though there has not been prosecution, or conviction, or acquittal of the defendant for the wrongful act, or omission, or negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. Such action must be brought within two years from and after the death of the testator or intestate. (Tit. 7, Code of Ala. 1940, § 123.)

Survival Acts

All actions on contracts, express or implied; all personal actions, except for injuries to the reputation, survive in favor of and against the personal representatives. (Tit. 7, Code of Ala. 1940, § 150.)

No action abates by the death or other disability of the plaintiff or defendant, if the cause of action survive or continue; but the same must, on motion, within twelve months thereafter, be revived in the name of or against the legal representative of the deceased, his successor or party in interest; or the death of such party may be suggested upon the record, and the action proceed in the name of or against the survivor. (Tit. 7, Code of Ala. 1940, § 153.)

Minnesota Statutes

Wrongful Death Act

Action for death by wrongful act. Whenever death is caused by the wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action therefore, if he might have maintained an action, had he lived, for an injury caused by the

same act or omission. The action may be commenced within two years after the act or omission. The damages therein cannot exceed $10,000, and shall be for the exclusive benefit of the surviving spouse and next of kin, to be distributed to them in the same proportion as personal property of [fol. 19] persons dying intestate; but funeral expenses and any demand for the support of the decedent other than old age assistance, duly allowed by the probate court, shall first be deducted and paid. If an action for such injury shall have been commenced by such decedent, and not finally determined during his life, it may be continued by his personal representative for the benefit of the same persons and for recovery of the same damages as herein provided, and the court on motion may make an order, allowing such continuance, and directing pleadings to be made and issues framed conformably to the practice in action begun under this section. (Minn. Stat. Ann., § 573.02.)

[fols. 20-22] COMPARISON OF PENNSYLVANIA, MINNESOTA, AND ALABAMA WRONGFUL DEATH ACTS

	Pennsylvania Act	*Minnesota Act*	*Alabama Act*
Basis of Liability	By express provision: "Whenever death shall be occasioned by unlawful violence or negligence . . ."	By express provision: "Whenever death is caused by the wrongful act of any person . . ."	By express provision: ". . . the wrongful act, omission or negligence of any person . . . whereby the death . . . was caused . . ."
Party entitled to bring suit	By rule of Court since 1939: Personal representative. Pa. R. C. P. 2202(a).	By express provision: Personal representative.	By express provision: Personal representative.
Availability of defenses good against decedent	No express provision; such defenses generally available by interpretation only: *Valente v. Lindner*, 340 Pa. 508, 17 A. 2d 371 (1941); *Hill v. Pennsylvania R. Co.*, 178 Pa. 223, 35 Atl. 997 (1896); *Howard v. Bell Tel. Co.*, 306 Pa. 518, 160 Atl. 613 (1932).	Such defenses generally available by express provision and interpretation. "if (decedent) might have maintained an action . . . for an injury caused by the same act or omissions" *Geldert v. Boehland*, 200 Minn. 332, 274 N.W. 245 (1937).	Such defenses generally available by express provision and interpretation: "if (decedent) . . . could have maintained an action for such wrongful act, omission or negligence if it had not caused death" *Breed v. Atlanta B. & C. R. Co.*, 241 Ala. 640, 645, 4 So. 2d 315, 319 (1942); compare, *Kaczorowski v. Kalkosinski*, 321 Pa. 438, 440, 184 Atl. 663, 664 (1936).
Beneficiaries	By express provision: "husband, widow child or parents."	By express provision: "surviving spouse and next of kin"	By express provision: statutory distributees under the statute of distributions, i.e. intestacy law.
Measure of Damages	By interpretation: pecuniary loss of beneficiaries. *Ferne v. Chadderton*, 363 Pa. 191, 197, 69 A. 2d 104 (1949).	By interpretation: pecuniary loss of beneficiaries with statutory maximum of $10,000. *Holz v. Pearson*, 229 Minn. 395, 39 N.W. 2d 867 (1950).	By interpretation: punitive damages. *Parker v. Fies & Sons*, 243 Ala. 348, 349, 10 So. 2d 13, 14 (1942).
Distribution	By express provision: as personal property under intestacy.	By express provision: as personal property under intestacy.	By express provision: according to the statute of distributions, i.e. intestacy law.
Freedom from creditors' liens.	By express provision: not subject to liens.	By express provision: not subject to liens.	By express provision: not subject to liens.

[fol. 23-24] Petition for Leave to Proceed in Forma Pauperis—August 22, 1951—(Omitted in Printing)

[fols. 25-27] Order Granting Petition—Filed August 27, 1951—(Omitted in Printing)

[fols. 28-30] Stipulation Extending Time to October 25, 1951—(Omitted in Printing)

[fols. 31-33] Stipulation Extending Time to December 8, 1951—(Omitted in Printing)

[fols. 34-36] Stipulation Extending Time to December 24, 1951—(Omitted in Printing)

[fol. 37] In United States Court of Appeals for the Third Circuit

No. 10,549

Roberta Wells, as Administratrix of the Estate of Cheek Wells, Appellant,

v.

Simonds Abrasive Company, a Corporation

Appeal from the United States District Court for the Eastern District of Pennsylvania

Argued January 24, 1952

Before Kalodner and Staley, Circuit Judges and Stewart, District Judge

Opinion of the Court—Filed February 4, 1952

Per Curiam:

In a thoroughly considered opinion Chief Judge Kirkpatrick discussed the problem presented by this appeal in the light of the Pennsylvania and Alabama decisions.

We find ourselves in complete accord with his reasoning and conclusions. Judgment of the Court below, therefore, will be affirmed upon the opinion of Chief Judge Kirkpatrick. F. Supp.

[fol. 38] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,549

ROBERTA WELLS, as Administratrix of the Estate of Cheek Wells, Appellant,

vs.

SIMONDS ABRASIVE COMPANY

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: Kalodner and Staley, Circuit Judges, and Stewart, District Judge.

JUDGMENT—Filed February 4, 1952

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed with costs.

Attest:

Ida O. Creskoff, Clerk.

February 4, 1952.

[File endorsement omitted.]

[fols. 39-41] PETITION TO EXTEND TIME FOR FILING PETITION FOR REARGUMENT—February 14, 1952—(Omitted in Printing)

[fols. 42-43] ORDER EXTENDING TIME TO MARCH 5, 1952—(Omitted in Printing)

[fol. 44] IN UNITED STATES COURT OF APPEALS

[File endorsement omitted.]

[fol. 45] PETITION FOR REARGUMENT—Filed February 28, 1952

Comes now, Roberta Wells, as administratrix of the estate of Cheek Wells, appellant in the above entitled case, and presents this her petition for reargument before the court in banc and in support thereof respectfully shows:

1. Your honorable Court (Judges Kalodner, Staley and Stewart) on February 4, 1952 filed its opinion (Appendix 1) affirming Per Curiam the judgment of the United States District Court for the Eastern District of Pennsylvania upon the opinion of that Court (Appendix 2). By order of this Court, Goodrich, J., dated February 14, 1952, the time for filing this petition for reargument was extended to March 5, 1952. Permission was heretofore duly granted to petitioner to proceed in forma pauperis and for that reason this petition has not been printed.

2. The suit was for damages for the death of plaintiff's decedent on April 19, 1948, in Alabama, caused by a defectively constructed grinding wheel manufactured by defendant. The suit was brought on April 19, 1950, in Pennsylvania, where defendant has its principal place of business, defendant having no office or place of business in Alabama.

3. Title 7 Section 123 of the Alabama Code of 1940 (quoted in full Appendix 3) provides that a personal representative may bring an action and recover damages based on negligence causing the death of his intestate, if [fol. 46] the latter could have maintained such an action had he not died; the damages recovered not being subject to his debts and being distributed according to the statute of distributions, such action to be brought within two years after the death.

4. The Pennsylvania Act of July 2, 1937, P. L. 2755, amended the title of the Act of June 7, 1917 to include "the survival of causes of action and suits thereupon by or against fiduciaries" and reenacted clause (b) of Section 35 of said Act of 1917[1] as follows:

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[1] This Section 35(b) had been held unconstitutional on account of defective title in 1923, in the case of *Strain v.*

"(b) Executors or administrators shall have power, either alone or jointly with other plaintiffs, to commence and prosecute all actions for mesne profits or for trespass to real property, and all personal actions which the decedent whom they represent might have commenced and prosecuted, except actions for slander, and for libels; . . ."

5. In *Stegner v. Fenton*, 351 Pa. 292 (1945) the Supreme Court held that the limitation period under the Act of 1937 was two years, this being the period fixed by the Act of June 24, 1895, P.L. 236, Section 2, for actions for personal injuries, as originally set forth in the Act of March 27, 1713, P. L. 76. [fol. 47] In that case, as in the case at Bar, the defendant contended that the Act of 1855 barred any suit after one year. This argument was rejected by the Court as follows (p. 296):

"The Acts have consistently applied the one year limitation *exclusively* to those actions where suit is brought by the *surviving relatives* for wrongful death." (Emphasis supplied.)

In the present case the suit was brought, in accordance with the Alabama statute, by plaintiff as decedent's personal representative, and *not* as the surviving relative.

6. It cannot be disputed that if, on April 19, 1950, plaintiff had brought this action, with service on the defendant, in Alabama, in the same form as the present suit, the action would have been in time under the Alabama statute and would have stated a valid cause of action. It has never been our contention, and is not now, that the limitation provision of the Alabama statute governs this case. We agree that the limitation provisions of the forum are controlling and rely on the Alabama statute merely to show that the

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Kern, 277 Pa. 209. The case of *Rosenzweig v. Heller*, 302 Pa. 279, relied on by Judge Kirkpatrick, was decided in 1931 between the decision of *Strain v. Kern* and the reenactment of the provisions in the Act of 1937.

The provision above quoted was incorporated in Sections 601 and 603 of the Fiduciaries Act of April 18, 1949, P.L. 512, 541, 542; 20 P.S. Sections 320.601 and 320.603.

plaintiff has a valid claim under Alabama law from which she would not have been barred in a suit brought by her in Alabama.

7. Nor can it be disputed that if the accident had happened in Pennsylvania, plaintiff, as the personal representative of her husband's estate, could have brought an action in Pennsylvania on April 19, 1950, under the Act of 1937, above quoted, and that such action would have been timely and valid.

8. If the Act of 1937 were the only Act in Pennsylvania [fol. 48] permitting a suit to recover damages for a negligent act causing death, there could be no question that, under the decisions, the two-year limitation period which the Supreme Court has held applicable to suits under the Act of 1937, would apply to the suit based on negligence in Alabama.

9. The mere fact that there is also in Pennsylvania the Act of April 26, 1855, P.L. 309, permitting suits for negligent acts causing death by the husband, widow, children or parents of the deceased, and providing a one-year limitation for such suits, *under that Act* is immaterial to the present case.

10. Nor would the case be any different if instead of one Act of 1855, there were four different Acts, one giving a right of action to the husband, another to the widow, another to the children and a fourth to the parent, with respective limitation periods of six, nine, twelve and eighteen months.[1] The fact that Pennsylvania contains a statute permitting a suit by the personal representative and providing a two-year limitation in such a case demonstrates conclusively [fol. 49] that there is no public policy in Pennsylvania against the maintenance of such a suit during the period of two years.

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[1] All such rights of action would be based on one and the same cause of action, *the negligent act causing death*; likewise, the rights of action under the Alabama law and the Pennsylvania Act of 1937 are based on the identical cause of action. See *Fisher v. Hill*, 368 Pa. 53, 58, 59 (1951).

11. In Judge Kirkpatrick's opinion, which was affirmed per curiam by this Court, he said:

> ". . . the only question here is whether the limitation of the Act of 1855 applies, or that of the Alabama statute . . . The plaintiff contends that her cause of action is not the same as that created by the Pennsylvania Act of 1855, that, therefore, the rule of Rosenzweig vs. Heller, supra, does not apply and, there being no comparable Pennsylvania statute, the limitation of the Alabama Act must govern."

12. In thus stating the question involved, Judge Kirkpatrick entirely misunderstood the real point in the present case, as he further did in relying on the decision in *Rosenzweig v. Heller*, 302 Pa. 279, which was decided in 1931,[1] prior to the amendment of 1937 on which we rely in this case. In 1931 the *only* act permitting recovery for a negligent act causing death was the Act of 1855, which provides a one-year limitation.

13. Nor does it in the least matter whether the Act of [fol. 50] 1855 or the Act of 1937 are spoken of as Death Statutes, or as Survival Statutes.[2] Section 35(b) of the

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[1] In the above case the Supreme Court said, at page 258:

> "Statutes of limitation should operate equally upon litigants seeking relief in our courts, upon those invoking remedies here for causes of action originating elsewhere, the same as upon those whose rights arise directly in our Commonwealth."

[2] As the Court pointed out in *Strain v. Kern*, 277 Pa. 209, 212 (1923) the only true survival statute in Pennsylvania is Section 35(a) of the Fiduciaries Act of 1917, P. L. 447, which permits the personal representative of a decedent to carry on after the decedent's death an action which he had instituted during his lifetime. As the Court put it (p. 212):

> ". . . for 'survival' implies something existing which is to survive, and 'substitution of executors and administrators therein' can only refer to a suit brought

Act of 1937 specifically authorizes an administratrix to commence and prosecute an action for personal injuries which her decedent might have prosecuted, as does the Alabama statute. See *Stegner v. Fenton*, 351 Pa. 292. The fact remains that this Act of 1937 conclusively demonstrates the policy of Pennsylvania to be to allow two years for the administrator of one killed by the wrongful act of another to bring suit in Pennsylvania to recover damages for the benefit of his estate and heirs, irrespective of where the accident occurs; which is all we have to know for the purpose of this case.

[fol. 51] 14. Judge Kirkpatrick's decision was to the effect that the personal representative of a man killed in Alabama should have sued in Pennsylvania within one year from the death, whereas two years would have been allowed had the accident occured in Pennsylvania and two years would have also been allowed had service been obtainable in Alabama. As applied to the case at Bar this is equivalent to holding that the plaintiff, compelled to seek out the defendant in Pennsylvania, had no claim at a time when if the accident had happened here or if the suit could have been brought in Alabama, recovery would have been permitted. This was precisely what the Supreme Court of the United States said in *Hughes v. Fetter*, 71 S. Ct. 980 (1951), might not be done. In that case the Supreme Court of Wisconsin had sustained a Wisconsin statute permitting suits for wrongful death occurring within that state, but denying all remedy in the Wisconsin courts for death in an accident occurring outside of Wisconsin. The Supreme Court held that this statute violated the Full Faith and Credit Clause of the Constitution. The majority said:

> "It [the Supreme Court of Wisconsin] held that a Wisconsin statute, which creates a right of action only for deaths caused in that state, establishes a local public policy against Wisconsin's entertaining suits

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by a decedent, in which, because of his death, the names of his personal representatives are to be substituted."

Section 123 of the Alabama Code, above cited, provides for a direct suit by the personal representative where the decedent has not already brought any action.

brought under the wrongful death acts of other states." (p. 981)

"We hold that Wisconsin's policy must give way. That state has no real feeling of antagonism against wrongful death suits in general. To the contrary, a forum is regularly provided for cases of this nature, [fol. 52] the exclusionary rule extending only so far as to bar actions for death not caused locally." (p. 982)

Since, under the Act of 1937, Pennsylvania permits the bringing of a suit by the personal representative for the death of the decedent by negligent act within two years if the accident occurs in Pennsylvania, it is obligated under *Hughes v. Fetter*, supra, to permit the bringing of such an action in Pennsylvania within the same period where the accident occurs in another state and is permitted by the statutes of that state. It would be unconstitutional for Pennsylvania to bar this suit by using the limitation provision of another statute under which the suit was *not* brought.

15. The decision of this Court in *Hughes v. Lucker*, 174 F. (2d) 285 (1949), while in point, should not be controlling here, since, as the opinion and briefs will show, it was rendered without consideration of the Act of 1937, just as was the case at Bar.[1]

16. While the present case is of vital importance to the plaintiff, who has been denied relief solely because she was [fol. 53] compelled to sue the defendant in Pennsylvania, it is also important generally in similar situations frequently arising, including one case now pending on appeal to this Court, *Quinn v. Simonds Abrasive Company*, No. 10,641, from the Eastern District of Pennsylvania under a

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[1] In the above case, referring to *Rosenzweig v. Heller*, this Court said that that case established the "rule of policy" for Pennsylvania and that "no action for a death by wrongful act can be brought in Pennsylvania after the one year period has expired." The Court made this statement without realizing that the Act of 1937 had clearly altered the policy of Pennsylvania thereafter to permit actions to be brought by the personal representative to recover damages for the decedent's death up to two years.

decision by Judge Welsh, holding that an action in Pennsylvania on an Ohio accident was timely under Section 35(b) of the Act of 1937 when brought within two years but more than one year after the death. This is precisely contrary to the decision by Judge Kirkpatrick in the case at Bar. Appellant's brief in the Quinn case is due in this Court on March 6th, one day after that fixed for the filing of the present petition for reargument. Inasmuch as this Court will then be required to reconsider this question, it is but fair that the plaintiff in the present case should have the benefit of such reconsideration.

Respectfully submitted, Henry S. Drinker, Charles J. Biddle, Attorneys for Appellant.

[fol. 54] [Opinion of the Court Omitted. Printed side page, 37, ante.]

[fols. 55-58] [Opinion of the District Court Omitted. Printed side page, 7, ante.]

[fols. 59-60] [Alabama Code of 1940, Title 7, Section 123: Omitted. Printed side page, 17 ante.]

[fol. 61] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

[Title omitted]

[fol. 62] APPELLEE'S ANSWER TO APPELLANT'S PETITION FOR REARGUMENT—Filed March 5, 1952

Appellant's petition for reargument clearly shows that the Appellant still does not understand the legal questions involved in this case; and thus on page 9 she states that Judge Welsh's Opinion in the *Quinn* case "is precisely contrary to the decision by Judge Kirkpatrick in the case at Bar." Actually Judge Welsh followed precisely the same

principles which formed the basis of Judge Kirkpatrick's decision, and so dismissed so much of the cause of action in the *Quinn* case as arose under the Ohio Wrongful Death Statute and preserved that portion of it which arose under the Ohio Survival Statute (Appellee's Brief, pp. 11, 12), thus giving effect to the distinction so clearly marked by the Pennsylvania decisions and which Appellant persistently refuses to recognize.

Only by closing her eyes to the Pennsylvania cases, many of which are cited and discussed on pages 7 to 11 of Appellee's Brief, could Appellant state, as she does in paragraph 13 of her petition for reargument, that it does not "matter whether the Act of 1855 or the Act of 1937 are spoken of as Death Statutes, or as Survival Statutes." In such a statement Appellant is still merely attempting to juggle words, as she did in her original briefs.

In saying, as she does at the top of page 8 of her petition, that a suit for death by negligent act may be brought "within two years if the accident occurs in Pennsylvania," Appellant fails to note the important qualification that it is a survival action alone that may be brought within two years, whereas a death action must be brought within one year. Thus, since the Alabama law authorizes only a death action and, unlike that of Ohio or Pennsylvania, furnishes no basis for a survival action, it is quite inaccurate to state [fol. 63] generally, as Appellant does at the top of page 7 of her petition, that "two years would have been allowed had the accident occurred in Pennsylvania." Two years would have been allowed for a *survival action* had the accident occurred in Pennsylvania, but only one year would have been allowed for a *death action* had the accident occurred in Pennsylvania. Since a death action is the only right of action created by the Alabama Statute, that is the only right of action that may be asserted anywhere, either within Alabama or without, and Judge Kirkpatrick was accordingly bound by the Pennsylvania law to apply the one-year period of limitation to the present action. In *Parker v. Fies & Sons*, 243 Ala. 348 (1942), 10 So. 2d 13, 14, referred to on pages 18 and 19 of Appellee's Brief, the Alabama Supreme Court said:

> "The statute providing for survival of actions for 'injuries to the person' does not apply to actions for

injuries from wrongful act resulting in death, with a consequent right of action under the Homicide Act. The survival statute has a field of operation in actions where death ensues from other causes. The lawmakers did not contemplate two actions by the same administrator against the same defendant for the same tort, prosecuted to separate judgments, one to recover for personal injuries for the benefit of the estate, and another for punitive damages for the benefit of next of kin."

It is only by ignoring the distinction between death actions and survival actions in the Alabama law as well as in the Pennsylvania law that Appellant may delude herself into thinking that it is immaterial whether the applicable act be called a Death Statute or a Survival Statute.

Since paragraph 16 of Appellant's petition makes it clear that she merely wants to delay the ultimate decision of this case until decision of the *Quinn* case, in the hope [fol. 64] that the Court may perhaps reach conflicting conclusions, it is submitted that the petition for reargument should be denied.

Respectfully submitted, Philip Price, Robert M. Landis, Attorneys for Appellee.

Barnes, Dechert, Price, Myers & Rhoads, Of Counsel.

[fol. 65] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,549

ROBERTA WELLS, as Administratrix of the Estate of CHEEK WELLS, Appellant,

v.

SIMONDS ABRASIVE COMPANY, a Corporation

Appeal from the United States District Court for the Eastern District of Pennsylvania

Argued January 24, 1952

Before Kalodner and Staley, Circuit Judges, and Stewart, District Judge

OPINION OF THE COURT ON PETITION FOR REHEARING—Filed March 26, 1952

PER CURIAM:

The petition for rehearing is premised on an entirely erroneous conception of Section 2 of the Act of July 2, 1937, P. L. 2755, known as the Survival Act.[1]

According to plaintiff's view " . . . the present remedy for wrongful death stems from the Act of 1937, which gives the major remedy, namely, the right on the part of the de- [fol. 66] ceased's estate to recover all his life was reasonably worth."[2]

The Supreme Court of Pennsylvania has explicitly ruled to the contrary and has held that the Acts of 1851 and 1855, known as the Death Acts[3] alone make recoverable the type of damages described by the plaintiff. Kaczorowski v. Kalkosinki, 321 Pa. 438 (1936); Pezzulli v. D'Ambrosia, 344

[1] The Act is now incorporated in Sections 601 and 603 of the Fiduciaries Act of 1949.

[2] Page 22, Brief for Appellant.

[3] Act of April 15, 1851, P. L. 669, Sec. 19, as amended by the Act of April 26, 1855, P. L. 309, Sec. 1.

Pa. 643 (1942); Stegner v. Fenton, 351 Pa. 292 (1945). In the latter two cases the Court clearly distinguished the nature of actions under the Death Acts of 1851 and 1855 and the Survival Act of 1937 and pointedly stated in Stegner v. Fenton, supra, (page 295) "By no stretch of imagination can the provisions of that act (the Act of 1855) be grafted upon the 'survival' Act of 1937, supra, which was passed for an entirely different purpose. The Acts of 1851 and 1855, supra, are 'death' statutes, not 'survival' acts."

In Pezzulli v. D'Ambrosia, supra, the Supreme Court also stressed the fact, at page 647, that actions under the Death and Survival Acts "are entirely dissimilar in nature"; under the Death Act the cause of action ". . . is for the benefit of certain enumerated relatives of the person killed by another's negligence; the damages recoverable are measured by the pecuniary loss occasioned to *them* through deprivation of the part of the earnings of the deceased which they would have received from him had he lived."; and that the cause of action under the Survival Act "merely continues in his personal representatives the right of action which accrued to the deceased at common law because of the tort; the damages recoverable are measured by the pecuniary loss occasioned to *him*, and therefore to *his estate* by the negligent act which caused his death."

[fols. 67-68] It is crystal clear that the Alabama statute upon which the plaintiff relies as a basis for recovery is a true death statute as was held by the learned District Court Judge and furnishes no basis for an action within the scope of the Survival Act of 1937. What the plaintiff is seeking to do here is precisely what the Supreme Court of Pennsylvania said could not be done.

For the reasons stated the petition for rehearing will be denied.

[fol. 69] IN UNITED STATES COURT OF APPEALS

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed March 26, 1952

After due consideration the petition for rehearing in the above entitled case is hereby denied.

Attest:

Ida O. Creskoff, Clerk.

Dated March 26, 1952.

[File endorsement omitted.]

[fol. 70] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 71-75] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 394

Petition for Leave to Proceed in Forma Pauperis and affidavit in support thereof (omitted in printing).

[fol. 76] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 52 Misc.

[Title omitted]

ORDER GRANTING CERTIORARI—October 13, 1952

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby,

granted limited to question No. 2 presented by the petition for the writ. The case is transferred to the appellate docket as No. 394.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.